

**U.S. Department of Labor**

Office of Administrative Law Judges  
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**Issue Date: 30 September 2003**

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**In the Matter of:**

**EUFEMIA MONTOYA, widow of  
JOSE E. MONTOYA, deceased,  
Claimant,**

**v.**

**Case No: 2001-BLA-00141**

**VALLEY CAMP OF UTAH, INC.  
Employer, and**

**DIRECTOR, OFFICE OF WORKERS'  
COMPENSATION PROGRAMS,  
Party-in-Interest.**

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**Appearances:**

For Claimant: Jonathan Wilderman, Esq., Wilderman & Linnet, Denver, CO

For the Employer: William S. Mattingly, Esq., Jackson & Kelly, Morgantown, WV

For the Director (on the briefing): Gregory W. Tronson, Esq., Regional Solicitor's Office,  
Denver, CO

Before: PAMELA LAKES WOOD  
Administrative Law Judge

**DECISION AND ORDER DENYING BENEFITS**

The above-captioned matter arises from a claim for surviving spouse's benefits under the Black Lung Benefits Act,<sup>1</sup> 30 U.S.C. § 901 *et seq.* (hereafter "Act"), where the deceased miner

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<sup>1</sup> The Act was adopted as Title IV of the Federal Coal Mine Health and Safety Act of 1969, and was amended by the Black Lung Benefits Act of 1972, the Black Lung Reform Act of 1977, the Black Lung Benefits Revenue Act of 1981, and the Black Lung Benefits Amendments of 1981. The pertinent amendments are discussed in 20 C.F.R. § 725.1.

was receiving Black Lung benefits during his lifetime. The pertinent implementing regulations appear at Parts 718 and 725 of Title 20 of the Code of Federal Regulations, as amended.<sup>2</sup>

Benefits are awarded to coal miners who are totally disabled due to pneumoconiosis, or to the survivors of coal miners who died from pneumoconiosis. *See* 20 C.F.R. §725.1(a).

Pneumoconiosis, commonly known as “black lung disease,” is a chronic disease of the lungs and its sequelae (including respiratory and pulmonary impairments) resulting from coal mine employment and its attendant dust exposure. *See* 20 C.F.R. §725.101(a)(20).

The instant case involves a claim for surviving spouse’s benefits filed on March 29, 2000, by Claimant Eufemia<sup>3</sup> Montoya (“Claimant”) based upon the death of her late husband, miner Jose A. Montoya (“Miner”) which led to a grant of benefits by the District Director and the payment of interim benefits by the Black Lung Disability Trust Fund. The responsible operator is Valley Camp of Utah, Inc. (“Employer”) which is self-insured through Accordia Employers Service.

A formal hearing was held before the undersigned administrative law judge on November 7, 2002 in Price, Utah. Each party submitted a Pre-Hearing Report including a medical evidence summary. At the hearing, Director’s Exhibits 1 through 20, Claimant’s Exhibits 1 through 16, and Employer’s Exhibits 1 through 16 were admitted into evidence.<sup>4</sup> Testimony was provided by Claimant Eufemia Montoya, the Miner’s widow; Wayne A. Anderson, a coal miner who worked with the Miner; Tony Nick Kourianos, the Miner’s foreman; and Tom Joseph Montoya, the Miner’s son.

At the hearing, Employer asked that Claimant’s Exhibits 11 and 13, the supplemental reports of Drs. Nichols and James, be rejected. Employer asserted that, although the reports were

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<sup>2</sup> Part 718 of title 20 of the Code of Federal Regulations is applicable to this claim, as it was filed after March 31, 1980. 20 C.F.R. § 718.2. These regulations were recently amended. *See* 65 Fed. Reg. 79,920 (Dec. 20, 2000). However, under 20 C.F.R. § 725.2 (2001), the 1999 version of specified sections (including sections 725.309 and 725.310) are to be applied to claims pending on January 19, 2001. Also, standards for the administration of clinical tests appearing in Subpart B of Part 718 (sections 718.101 through 718.107) only apply to evidence developed after January 19, 2001. In *National Mining Assn. v. Dept. of Labor*, – F.3d. –, Case No. 01-5278 (D.C. Cir. June 14, 2002), the U.S. Court of Appeals for the D.C. Circuit rejected a challenge to, and upheld, the amended regulations with the exception of several sections which were found to be impermissibly retroactive and one which attempted to effect an unauthorized cost shifting. None of those provisions are applicable to the instant claim. Section and part references appearing herein are to Title 20 of the Code of Federal Regulations unless otherwise indicated.

<sup>3</sup> At the hearing, Claimant clarified that her first name is spelled “Eufemia.”

<sup>4</sup> References to the Director’s Exhibits, Claimant’s Exhibits, and Employer’s Exhibits ,admitted into evidence at the November 7, 2002 hearing before the undersigned and herein, appear as “DX”, “CX” and “EX”, respectively, followed by the exhibit number. References to the hearing transcript appear as “Tr.” followed by the page number. Although Claimant’s Exhibit 17, a page from Director’s Exhibit 12, was marked for identification purposes, it was not admitted separately. (Tr. 44).

submitted barely 20 days prior to the hearing, Employer had not received timely notice of their existence even though Employer had requested seasonable supplementation of discovery responses. Alternatively, Employer requested the opportunity for its experts to respond to the reports. I ruled that the record would be left open for a single measured response. (Tr. at p. 17 to 25, 28 to 29, 85 to 88). I indicated at the hearing that the single response by one of the Employer's experts could address the supplemental report by Dr. James and also, to the extent that a change in his opinion was reflected therein, the supplemental report by Dr. Nichols. (Tr. at p. 85 to 88.) The single response was to become Employer's Exhibit 16 (EX 16) and was to be submitted within sixty days of the hearing.

In addition, the Employer was allowed to take the post-hearing deposition of Dr. Wiot, and I ruled that Dr. Wiot would be able to review everything that was available at the time of the deposition, to the extent that it had bearing on his opinion as a radiologist.<sup>5</sup> The record was kept open for sixty days for that purpose. (Tr. at p. 25 to 31, 83 to 84, 87 to 88). The deposition transcript was to become Employer's Exhibit 15 (EX 15).

On January 9, 2003, Employer submitted as EX 16, Dr. Lawrence H. Repsher's report of December 9, 2003, which responded to the supplemental reports of Drs. James and Nichols. Employer also indicated that Dr. Wiot's scheduled deposition had been cancelled due to difficulty in obtaining 1997 CT scans for his review, and Employer requested that the record be left open and the parties be allowed until February 21, 2003 to take Dr. Wiot's deposition.

By letter of January 14, 2003, filed on January 21, 2003, Claimant requested that paragraph 1 of Dr. Repsher's December 9, 2002 report be stricken, or, in the alternative, that she be allowed to submit responses by her experts, Drs. James and Nichols, to said paragraph. Claimant further opposed Employer's request to take the posthearing deposition of Dr. Wiot, asserting that the deposition was cancelled over her counsel's objection on the date for which it was scheduled. Claimant further noted that Employer had advance notice of the existence of the CT scans. In the event that the deposition was allowed, Claimant requested the opportunity to submit a response report by Dr. James.

My Order of March 12, 2003 (1) denied the request to strike the first paragraph of Employer's Exhibit 16, Dr. Lawrence H. Repsher's report of December 9, 2003, as Claimant had not been prejudiced by the discussion of Dr. Nichols' report therein, and (2) denied Employer's request to keep the record open to take the posthearing deposition of Dr. Wiot in view of the unilateral cancellation of the originally scheduled deposition. The Order admitted Employer's

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<sup>5</sup> There was a mistranscription. I stated: "I sort of hate to have Dr. Wiot's deposition taken **without** having him review everything that's available at the time of the deposition. So I guess I'll allow that, but only to the extent that it has bearing on his opinion as a radiologist." [Emphasis added]. The word "without" was incorrectly transcribed as "with." (Tr. at p. 30).

Exhibit 16 into evidence, ordered that the Director submit briefing on the collateral estoppel issue<sup>6</sup> within 30 days (or 60 days, if necessary to obtain the official position of the Department), and allowed the parties thirty days (which could be extended to sixty days by stipulation) to submit briefs or written closing arguments. The Claimant's Post Hearing Brief and the Employer's written closing argument were filed on May 21, 2003 and the Director's brief (responding to the March 12, 2003 Order) was filed on June 13, 2003. The record is closed and the case is ready for decision.

The findings of fact and conclusions of law which follow are based upon my analysis of the entire record, including all documentary evidence admitted. Where pertinent, I have made credibility determinations concerning the evidence.

### **STATEMENT OF THE CASE**

Claimant filed the instant claim on March 29, 2000, based upon the death of her husband, the Miner, on September 24, 1998. (DX 1). After receiving notice of the claim, on May 1, 2000, the Employer filed a controversion, pursuant to which it reserved all issues. (DX 8). Under a Notice of Initial Finding of June 1, 2000, the Claimant was determined to be entitled to benefits commencing on September 1, 1998. (DX 9). In a response filed on June 19, 2000, the Employer again controverted the claim, reserving all issues. (DX 10). Following additional development, the district director again found the Claimant entitled to benefits on September 19, 2000, and payments were to be made from the Trust Fund. (DX 13, 15). On October 11, 2000, the Employer advised that it continued to contest liability and requested a hearing. (DX 16). The case file was transmitted for a hearing on November 13, 2000. (DX 20).

During his lifetime, the Miner filed three claims for benefits. The first, filed on May 5, 1975, was denied based upon a claims examiner's November 14, 1980 finding that the Miner was not totally disabled. (DX 17). The second, filed on January 23, 1986, was denied on March 21, 1986 for the same reason. (DX18). However, the third claim, filed on February 26, 1995, was initially granted on May 20, 1996, and Employer filed an Agreement to Pay Benefits on June 17, 1996, leading to a June 18, 1996 Award of Benefits. (DX 19). In that Award, the district director found that the Miner was born in August 1920 and worked in the Nation's coal mines for 27 years, between 1941 and January 1986.<sup>7</sup> *Id.* The Award also found that "as a result of the conditions of coal mine employment, the claimant has contracted a severe chronic respiratory

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<sup>6</sup> Prior to the hearing, on October 15, 2003, Claimant had submitted a Motion for Partial Summary Judgment, in which Claimant argued that Employer should be barred from relitigating the issues of length of coal mine employment, pneumoconiosis, and total respiratory impairment based upon the doctrine of collateral estoppel. Employer opposed that motion on October 28, 2002. At the November 7, 2002 hearing, I took the issue under advisement.

<sup>7</sup> In his January 1986 and February 1996 claim forms, the Miner indicated that he stopped working in the coal mines in August 1985 because of injuries sustained during a mining accident.

disease diagnosed as coal workers' pneumoconiosis" as defined in the Act and regulations and that it caused "a breathing impairment of sufficient degree to establish total disability" within the meaning of the Act and regulations. *Id.* The Miner was receiving benefits at the time of his death. *Id.*

## **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

### **Issues/Stipulations**

The following issues were listed when the case was transmitted:

1. Length of coal mine employment;<sup>8</sup>
2. Whether the Miner's disability or death was due to pneumoconiosis.<sup>9</sup>

(DX 20). At the time of the November 7, 2002 hearing, over Claimant's objection, the list of issues was amended to include pneumoconiosis, causal relationship, and length of coal mine employment. (Tr. 6 to 9). In addition, as noted above, the Claimant's October 15, 2002 motion for partial summary judgment, based upon the theory that the Employer was barred from relitigating those issues by virtue of the doctrine of collateral estoppel, was taken under advisement. (Tr. 9 to 10). Employer stipulated to at least ten years of coal mine employment but admitted that Employer had no basis for challenging approximately 29 of the years claimed. (Tr. 9 to 10). The Director agreed to 27 years of coal mine employment. (DX 20).

### **Medical Evidence**

The medical evidence consists of interpretations of x-rays taken between 1972 and 1998; the results of pulmonary function tests taken from May 1972 until May 1997; interpretations of abdominal CT scans (including the lung bases) and stomach biopsies taken in 1997; arterial blood gases taken from February 1986 to May 1997; the medical examination reports of Drs. John Wright (April 9, 1976), O.W. Phelps (December 6, 1985), and Michael J. Lincoln (February 14, 1986 and March 30, 1996, with an April 3, 1996 supplemental report); hospital and medical records, including the notes or consultation reports by Drs. Douglas Ross (February 1996), Wayne Cox (April 1997 to November 1997), Richard Brown (August 1997), David A. Nichols (May 1997 to September 1998), and Glori Allen (September 1998); the death certificate, signed by Dr. Nichols; and the medical opinions rendered following the Miner's death of Drs. Nichols, David A. James, Jerome F. Wiot, Lawrence Repsher, James R. Castle, and David M. Rosenberg,

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<sup>8</sup> The length of coal mine employment issue was incorrectly listed as contested only by the Director. (DX 20).

<sup>9</sup> That issue was only contested by the Employer. (DX 20).

as well as the transcripts of Dr. Castle's April 15, 2002 deposition and Dr. Rosenberg's October 23, 2002 deposition.

### **Discussion and Analysis**

In evaluating the instant claim, I note that the Supreme Court has made it clear that the burden of proof in a black lung claim lies with the claimant, and if the evidence is evenly balanced, the claimant must lose. In *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43 (CRT) (1994), the Supreme Court invalidated the "true doubt" rule, which gave the benefit of the doubt to claimants.

***Collateral Estoppel.*** As noted above, the district director determined in 1996 that the Miner had 27 years of coal mine employment, that the Miner had pneumoconiosis arising out of his coal mine employment, and that he was totally disabled thereby. Employer did not appeal this determination and agreed to pay benefits. I must therefore decide whether the resolution of these issues in the Miner's claim is controlling in the instant case, brought by the Claimant, by virtue of collateral estoppel.<sup>10</sup>

The Benefits Review Board has held that collateral estoppel (or issue preclusion) will apply if (1) the issue sought to be precluded is identical to one previously litigated; (2) the issue was actually determined in the prior proceeding; (3) the issue was a critical and necessary part of the judgment in the prior proceeding; (4) the prior judgment is final and valid; and (5) the party against whom estoppel is asserted had a full and fair opportunity to litigate the issue in the previous forum. *Hughes v. Clinchfield Coal Company*, 1999 WL 297213, 21 B.L.R. 1-134 (1999) (en banc).<sup>11</sup> See also *Sedlack v. Braswell Services Group, Inc.*, 134 F.3d 219 (4th Cir. 1998); *Sandberg v. Virginia Bank Shares, Inc.*, 979 F.2d 332, 334 (4th Cir 1992) *vacated*, 1993 WL 524680 (4th Cir. April 7, 1993). A similar but slightly different rule, based upon the Restatement (Second) of Judgments §27, has been applied in the Tenth Circuit, as the Court of Appeals stated in *Dodge v. Cotter Corp.*, 203 F.3d 1190, 1198 (10th Cir. 2000):

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<sup>10</sup> Under the doctrine of res judicata or claim preclusion, a subsequent suit based on the same cause of action as a prior suit that involves the same parties or their privies is barred where there has been a final judgment on the merits in the prior suit (*e.g., Labelle Processing Co. v. Swarrow*, 72 F.3d 308, (3d Cir. 1995)), while under the law of the case doctrine, if a legal decision made at one stage of litigation is unchallenged when the opportunity presents itself, it is controlling in subsequent stages (*e.g., U.S. v. Escobar-Urrego*, 110 F.3d 1556 (11th Cir. 1997)). Inasmuch as a different cause of action is involved here, and the proceedings concerned here cannot be deemed to be part of the same litigation as the Miner's claim, res judicata and the law of the case doctrine are not applicable.

<sup>11</sup> *Hughes* involved a survivor's claim when a miner had been determined to have pneumoconiosis and the Benefits Review Board declined to apply collateral estoppel to that issue. However, the denial was based upon the fact that the miner had not ultimately prevailed in the earlier claim.

In this Circuit, application of collateral estoppel requires: (1) the issue previously decided is identical with the one presented in the action in question, (2) the prior action has been finally [fully] adjudicated on the merits, (3) the party against whom the doctrine is invoked was a party, or in privity with a party, to the prior adjudication, and (4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action.

203 F.3d at 1198; *see also United States v. Botefuhr*, 309 F.3d 1263, 1282 (10th Cir. 2002) (substituting “fully” for “finally” based upon Restatement (Second) of Judgments § 27 (1982), which requires that an issue be “actually litigated.”)<sup>12</sup> *But cf. Wyoming Fuel Co. v. Director, OWCP*, 90 F.3d 1502, 20 BLR 2-302 (10th Cir. 1996) (commenting that collateral estoppel bars a duplicate black lung claim in the absence of evidence showing a worsening of the miner’s condition after the previous claim was denied.)

There are exceptions to the doctrine of collateral estoppel that have been recognized and applied to Black Lung cases by the Benefits Review Board. First, collateral estoppel does not apply when significant evidence is submitted which was not available and could not have been obtained at the time of the adjudication of the prior claim. *See Hughes, supra*. In *Hughes*, the Benefits Review Board held that collateral estoppel would not apply to the issue of the existence of coal worker’s pneumoconiosis in a survivor’s claim when the issue was resolved in the miner’s claim without the benefit of autopsy evidence.<sup>13</sup> Second, there can be no collateral estoppel when the pertinent entitlement standards or burdens of proof are different or have changed. *See Alexander v. Island Creek Coal Co.*, 12 B.L.R. 1-44 (1988). In *Alexander*, the Board found that a determination made under the more liberal Part 727 regulations could not be controlling in a Part 718 case. However, in the unpublished decisions of *Young v. Sewell Coal Co.*, BRB No. 98-1000 BLA (Aug. 26, 1999) (unpub.) (following remand, BRB No. 00-0329 BLA (Dec. 7, 2000)) and *Villain v. Zeigler Coal Co.*, BRB No. 00-0451 BLA (Jan. 29, 2001) (unpub.), the Board found collateral estoppel to preclude an employer from retrying the issue of pneumoconiosis in a survivor’s claim, when that issue had been decided against the employer in the living miner’s claim, because both the miner and survivor had to establish pneumoconiosis using the same methods under section 718.202(a).

In her Motion for Partial Summary Judgment, Claimant argues that Employer should be barred from relitigating the issues of length of coal mine employment, pneumoconiosis, and total respiratory disability because those issues were resolved in the Award of Benefits, which

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<sup>12</sup> Section 27 of the Restatement (Second) of Judgments provides: “When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.”

<sup>13</sup> Importantly, as noted in footnote 11 above, the employer prevailed in the miner’s claim and therefore could not have appealed the adverse determination on the pneumoconiosis issue in *Hughes*.

Employer did not appeal, and Employer agreed to pay benefits. Thus, Claimant argues that the issue preclusion criteria have been satisfied. In opposition, Employer argues that the pertinent criteria have not been satisfied, because the agreement by the Employer to pay benefits predated the Award and was not appealed to an administrative law judge; therefore, the issues had not been litigated and the determinations were not necessary to the outcome. On the issue of pneumoconiosis, Employer argues there was no final judgment and it was unable to fully litigate this matter in view of new and relevant medical evidence (analogous to autopsy evidence) that was unavailable before. Employer also notes that total disability is irrelevant to this claim. In response to my Order, the Director notes that the Restatement, which is cited with approval in *Botefuhr*, precludes the use of collateral estoppel when stipulations are involved, because the issue has not been “actually litigated” in such an instance. The Director argues that such a situation is involved in the instant case, because the acceptance of liability is analogous to a consent judgment, an admission, or a stipulation.

Upon consideration of the arguments of the parties, and particularly the discussion by the Director, I find that the Employer is not precluded from litigating the issues of length of coal mine employment and pneumoconiosis in the context of this survivor’s claim. As the Director has noted:

. . . . The Supreme Court, as well as the Tenth Circuit, have viewed consent coupled with the absence of evidence as barriers to collateral estoppel [citing *Arizona v. California*, 530 U.S. 392, 415 (2000) and *Matosantos Commercial Corp. v. Applebee’s International, Inc.*, 245 F.3d 1203, 1208 (10th Cir. 2001)] . . . In the living miner claim, Valley Camp of Utah Inc. accepted liability without litigating or challenging the administrative notice of initial finding. This is analogous to a consent judgment, an admission, or a stipulation, and therefore the application of collateral estoppel is not appropriate in this survivor’s case.

(Director’s Response to March 12, 2003 Order at p. 3.) As the Director notes, examples from the Restatement, cited with approval by the Tenth Circuit, make it clear that collateral estoppel does not apply to situations such as the instant one, in which liability was accepted by agreement.

In making this determination, I recognize that there are cases analogous to the instant case in which collateral estoppel has been applied. In the unpublished Benefits Review Board cases of *Villain* and *Young*, both of which were survivor’s cases, the Board found collateral estoppel to apply to a determination that the miner had pneumoconiosis when the miner was receiving benefits at the time of his death. However, these cases are distinguishable from the instant case as the determination of the existence of pneumoconiosis was made after a trial on the merits and the administrative law judge’s finding had been affirmed on appeal. In the instant case, in contrast, the Employer voluntarily paid benefits. In addition, neither *Villain* nor *Young* applied the Tenth Circuit standard discussed above. For the same reasons, I find similar, previous Fourth Circuit survivor’s cases – involving a prior determination of the existence of pneumoconiosis following a

trial, a miner who was receiving benefits at the time of his death, and no autopsy evidence, in which I found collateral estoppel to apply – to be distinguishable from the instant case.<sup>14</sup>

In view of the above, I find that issue preclusion will not bar consideration of the issues in this case. I find, however, no basis for disturbing the district director's finding of 27 years of coal mine employment, and I adopt that finding, and I agree with the Employer that total disability is irrelevant, as this is a Part 718 case. The issue of pneumoconiosis will, however, be addressed on the basis of all of the evidence currently of record.

***Merits of Claim: Existence of Pneumoconiosis.*** The regulations (both in their original form and as revised effective January 19, 2001) provide several means of establishing the existence of pneumoconiosis: (1) a chest x-ray meeting criteria set forth in 20 C.F.R. § 718.102, and in the event of conflicting x-ray reports, consideration is to be given to the radiological qualifications of the persons interpreting the x-rays; (2) a biopsy or autopsy conducted and reported in compliance with 20 C.F.R. § 718.106; (3) application of the irrebuttable presumption for “complicated pneumoconiosis” set forth in 20 C.F.R. § 718.304 (or two other presumptions set forth in § 718.305 and § 718.306); or (4) a determination of the existence of pneumoconiosis as defined in § 718.201 made by a physician exercising sound judgment, based upon objective medical evidence and supported by a reasoned medical opinion. 20 C.F.R. § 718.202(a)(1)-(4). Under section 718.107, other medical evidence, and specifically the results of medically acceptable tests or procedures which tend to demonstrate the presence or absence of pneumoconiosis, may be submitted and considered. The definition of pneumoconiosis in § 718.201 has been amended to provide for “clinical” and “legal” pneumoconiosis and to acknowledge the latency and progressiveness of the disease.

While the x-ray evidence is split on the issue of whether the Miner had pneumoconiosis, it is clearly supportive of a finding of opacities on x-rays consistent with a finding of pneumoconiosis. Of the readings using the ILO system and satisfying the regulatory requirements, there were 20 interpretations of 10 x-rays taken between 1972 and 1998, 14 of which were positive for pneumoconiosis and six of which were negative,. All of the most qualified readers, who are dually qualified as B-readers and board-certified radiologists, found such opacities. The only readings that were negative for such a finding were the interpretations of Drs. Castle and Repsher, who are B-readers and are also board-certified pulmonologists (*i.e.*, board certified in internal medicine with a subspecialty in pulmonary diseases), but are not radiologists. Drs. Repsher and Castle read the April 16, 1996, November 6, 1997, and August 11, 1998 x-rays as negative for findings consistent with pneumoconiosis. However, each of these x-rays was read as showing parenchymal abnormalities consistent with pneumoconiosis by Dr. Wiot, who is dually qualified as a B-reader and board certified radiologist. Dr. Wiot opined that the abnormalities, while satisfying the ILO rules, were not CWP (coal workers' pneumoconiosis) and were most likely IPF (idiopathic pulmonary fibrosis) and in an accompanying report (dated

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<sup>14</sup> See for example *Fuller v. VA Crews*, 2001-BLA-0864 (ALJ Nov. 25, 2002) and *Dale v. Eastern Associated Coal Corp.*, 2001-BLA-0774 (ALJ Nov. 19, 2002).

February 7, 2002) indicated that there was some other disease process; however, that report will be discussed under the medical opinion evidence. The remaining x-rays (of April 22, 1972, May 13, 1972, April 9, 1976, April 10, 1976, February 10, 1986, March 26, 1986 and May 2, 1997) were uniformly interpreted as positive for findings consistent with pneumoconiosis.<sup>15</sup> I therefore find that a preponderance of the x-ray evidence tends to support a finding of pneumoconiosis under subsection (a)(1).

There were no biopsies of the lung and there was no autopsy, so pneumoconiosis cannot be established under subsection (a)(2).

Turning to the presumptions under subsection (a)(3), sections 718.305 (applying to certain claims filed before January 1, 1982) and 718.306 (applying to certain death claims filed prior to June 30, 1982) are inapplicable to this claim, which was filed in March 2000. With respect to section 718.304,<sup>16</sup> there is no x-ray evidence suggesting that the Miner had large opacities or lesions of the size associated with complicated pneumoconiosis. Thus, I find that Claimant has not established any of the presumptions under subsection (a)(3).

The medical opinion evidence to be considered under subsection (a)(4) consists of the opinions of Drs. Wright, Lincoln, Nichols, James, Wiot, Repsher, Castle, and Rosenberg.<sup>17</sup>

(1) John Wright, M.D., examined the Miner for the Department of Labor on April 9, 1976, and opined that he had pulmonary fibrosis related to his coal mine employment. (DX 17).

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<sup>15</sup> Under 20 C.F.R. §718.203, if a miner who worked for ten or more years in coal mines suffers from pneumoconiosis, there is a rebuttable presumption that the pneumoconiosis arose out of the coal mine employment. At the very least, that presumption requires opacities that are found to be consistent with pneumoconiosis by the ILO standards to be deemed presumptively as having arisen out of coal mine employment.

<sup>16</sup> Section 718.304 provides for an irrebuttable presumption a miner is totally disabled due to pneumoconiosis or that his death was due to pneumoconiosis if the miner is or was suffering from a chronic dust disease of the lung which (a) when diagnosed by chest x-ray yields one or more large opacities (greater than 1 centimeter in diameter) which would be classified as Category A, B, or C under the pertinent standards or (b) when diagnosed by biopsy or autopsy yields massive lesions in the lung or (c) when diagnosed by other means would reasonably be expected to yield the results described in (a) or (b).

<sup>17</sup> While other physicians' statements appear in the medical records, the opinions of these eight physicians are the only opinions that address the issue of whether the miner had pneumoconiosis and also may be deemed to be based upon "sound medical judgment" within the meaning of the regulations. 20 C.F.R. §718.202(a)(4). In this regard, while treating physician O.W. Phelps, M.D. wrote an opinion letter in December 1985, he addressed the disability issue but not the issue of whether the Miner suffered from pneumoconiosis. Further, I have **not** considered mere entries in the medical records without analysis to constitute reasoned medical opinions that would warrant consideration under section (a)(4).

(2) Michael J. Lincoln, M.D. examined the Miner for the Department of Labor on two occasions, a decade apart. In the February 14, 1986 examination report, he opined that the Miner had simple coal workers' pneumoconiosis based upon his chest x-ray that was "undoubtedly due to coal dust." (DX 18). In the March 30, 1996 examination report, he opined that the Miner had "CWP [with] honeycombing" that was attributable to coal dust exposure and he noted, "Comment – This is a fairly clear-cut case." (DX 19). Dr. Lincoln reported his findings, together with a discussion of the basis for his findings, to Dr. Phelps by letter of April 3, 1996. (DX 12).

(3) David Nichols, M.D., a board-certified internist and the Miner's treating physician since at least May 1997, variously reported pulmonary fibrosis, "Stable severe Black lung," and "longstanding coal workers pneumoconiosis" as diagnoses. (DX 12). On the death certificate, Dr. Nichols listed the cause of death as "Gastric Cancer" and he listed "coal workers pneumoconiosis" as another significant cause contributing to death but not resulting in the underlying cause. (DX 4). In an opinion letter of March 25, 2002, Dr. Nichols continued to maintain that the Miner had coal workers pneumoconiosis based upon the clinical evidence and opined that it hastened his death by between a few weeks up to a few months by reducing his functional capacity because "a cancer patient with good functional capacity at the time of diagnosis will live longer than a patient with poor functional capacity." (CX 10). In a supplemental report of October 11, 2002, he also opined that the Miner's death was hastened because he could not undergo surgery due to his severe CWP; he also suggested that CWP may have contributed to symptoms of pneumonia which in turn contributed to his reduced functional capacity and hastened his death. (CX 11).

(4) David S. James, M.D., a board-certified pulmonologist and B-reader, prepared a medical report dated October 16, 2002, in which he opined that the Miner had diffuse interstitial pulmonary fibrosis and that the Miner's "exposure to coal mine dust was a contributing factor in the development of his chronic respiratory disease, diffuse interstitial pulmonary fibrosis." (CX 13). He opined that while the fibrotic response to coal mine dust more frequently results in a nodular process, "[i]n a smaller percentage of miners, a reticular or linear pattern of fibrosis can also occur." *Id.* He cited supporting studies and noted the absence of other likely causes. *Id.* He also noted that honeycombing showed end stage lung disease and opined that the Miner's "life was shortened due to the diffuse interstitial fibrosis resulting from his coal mine employment." *Id.*

(5) Jerome Wiot, M.D., a board-certified radiologist and B-reader, explained in a report of February 7, 2002 why he found the opacities that he found on x-rays to represent IPF (idiopathic pulmonary fibrosis) rather than coal worker's pneumoconiosis, based upon the character and distribution of the changes found on x-rays (noting that there were no large opacities, there was honeycombing, and the primary changes were in the bases of the lungs and the mid zones) and the rapid progression of the disease (from 1986 through 1996 and continuing through to 1998). (EX 6).

(6) Lawrence Repsher, M.D., a board-certified pulmonologist and B-reader, opined in a report of March 26, 2001 that the Miner did not have coal worker's pneumoconiosis based upon the chest x-rays, which he deemed to be more consistent with usual interstitial pneumonia (UIP)

or some other form of idiopathic interstitial lung disease and that if he concurrently had CWP, it was unlikely to have contributed to his overall pulmonary impairment or hastened his death. (EX 2). He reiterated this conclusion in a report of August 5, 2002, in which he discussed three articles presented at Dr. Castle's deposition (one of which was cited by Dr. James.) (EX 12). In a report of December 9, 2002, he disputed the conclusions of Drs. Nichols and James and maintained that "honey combing has never been reported to occur with simple coal workers pneumoconiosis, but is characteristic of UIP." (EX16).

(7) James R. Castle, M.D., a board-certified pulmonologist and B-reader, prepared a report dated May 23, 2001, in which he opined that the Miner did not have coal worker's pneumoconiosis, primarily based upon the chest x-ray. (EX 4). Dr. Castle gave his deposition on April 15, 2002, and opined that the Miner had idiopathic pulmonary fibrosis, explaining that honeycombing was a manifestation of severe interstitial pulmonary fibrosis and was commonly associated with end-stage idiopathic interstitial fibrosis or end stage asbestosis, and not usually with coal-mine dust induced lung disease. (EX 9). He also noted the prevalence of s and t type opacities in the middle and lower lung zones and the marked progression of the disease as significant.<sup>18</sup> *Id.* He also stated that he did not believe that the Miner's cancer was quickened or hastened in any way by his underlying lung disease. *Id.* He reiterated his opinion in a supplemental report of July 15, 2002, in which he discussed the three articles cited at his deposition and conceded the possibility that a small number of individuals could have irregular opacities as the primary manifestation of CWP but maintained that such did not occur in the Miner's case. (EX 8).

(8) David Rosenberg, M.D., a board certified pulmonologist and B-reader who is also board-certified in occupational medicine, opined, in a report of February 18, 2002, that the Miner did not have CWP or any dust disease arising out of his coal mine employment and that the disability resulting from hypoxia was related to the presence of non-coal mine dust related interstitial lung disease. (EX 4). He also opined that the cause of death was "his underlying malignancy, which was obviously not caused or hastened by coal mine dust exposure." *Id.* In a supplemental report of July 30, 2002, he discussed Dr. Castle's deposition, criticized the studies presented, agreed with Dr. Castle's conclusions, noted that "advanced CWP causes conglomeration and massive fibrosis (not honeycombing.)," and opined that there was "no basis for any expert's conclusion that Mr. Montoya would have had a greater life expectancy without his lung disease." (EX 11). Dr. Rosenberg explained the basis for his conclusions further at his October 23, 2002 deposition. (EX 13).

After reviewing the medical opinion evidence, taking into account the credentials of the experts and the reasoning and foundation for their opinions, I find that the medical opinion evidence is, at best, in equipoise. In this regard, the opinions of Drs. Wiot, Repsher, Castle, and Rosenberg to the effect that the Miner most likely has idiopathic pulmonary fibrosis and not coal

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<sup>18</sup> On cross examination, Dr. Castle admitted that other readers primarily found rounded opacities. (EX 9).

workers' pneumoconiosis are well reasoned and well documented. *See Fields v. Island Creek Coal Co.*, 10 B.L.R. 1-19, 1-22 (BRB 1987) (stating that a "documented" opinion is one that sets forth the clinical findings, observations, facts and other data on which the physician based the diagnosis, and that a "reasoned" opinion is one in which the underlying documentation is adequate to support the physician's conclusions). In this regard, while Drs. Wright, Lincoln, and Nichols continue to maintain that the Miner's lung condition is CWP, they have not explained away the factors relied upon by the Employer's experts, including the presence of honeycombing. Dr. Wright's opinion was given at a time when the honeycombing had not yet manifested itself. Dr. Lincoln mentioned it, but did not address its significance. Dr. Nichols' opinion is similarly deficient. The credentials of Drs. Wright and Lincoln are not of record, while Dr. Nichols does not possess the board certification in the subspecialty of pulmonary disease possessed by Drs. Repsher, Castle, and Rosenberg. It is true that Dr. Nichols' opinion is entitled to some additional weight given his status as treating physician, as he clearly treated the Miner for over a year and a half before he died (with some frequency during his final months), and the treatment included his lung condition. *See generally* 20 C.F.R. § 718.105. However, the precise issue concerned here, the etiology of the Miner's undisputed pulmonary fibrosis and respiratory impairment, is not the type of issue for which treatment would necessarily provide an advantage. Turning to Dr. James, I note that he is a board certified pulmonologist, like Drs. Repsher, Castle, and Rosenberg. Dr. James essentially agrees with them that the Miner had a form of interstitial pulmonary fibrosis that was atypical of coal dust exposure, but he maintains, based upon the epidemiological evidence and his own experience treating coal miners, that coal dust is nevertheless the most likely cause for the fibrosis, in the absence of evidence of other etiologies, such as asbestos exposure or collagen vascular disease. His opinion, while also well reasoned and documented, cannot outweigh the opinions of Drs. Wiot, Repsher, Castle, and Rosenberg. Accordingly, I find that, at best, the medical opinion evidence is in equipoise.

Turning to the other evidence, it consists of histories recounted in the medical records, CT scans of the abdomen that included the lung bases (showing pulmonary fibrosis and honeycombing, consistent with the x-rays), and the testimony of the Miner's wife, son, and coworkers. It is of little if any significance in determining whether the Miner had CWP as it is irrelevant or cumulative of other evidence of record.

After considering all of the evidence on the issue of whether the Miner had pneumoconiosis – including the x-rays supporting such a finding and the medical opinion evidence which is at best in equipoise – I must conclude that there are three possibilities: (1) the Miner's lung condition was CWP or some other form of fibrosis caused by coal dust exposure; (2) the Miner's lung condition was idiopathic pulmonary fibrosis due to an unknown cause and was unrelated to his coal dust exposure; and (3) the Miner's lung condition was CWP combined with idiopathic pulmonary fibrosis. The third possibility is compatible with the evidence of record and takes into consideration the positive x-ray readings dating back to 1972, as well as the preponderance of medical opinions establishing that the Miner now has idiopathic pulmonary fibrosis, and I find it to be the most plausible and the most consistent with all of the evidence of

record.<sup>19</sup> Looking at section 718.202 as a whole, I find that the Claimant has established that he suffers from at least minimal coal worker's pneumoconiosis by a preponderance of the evidence.

***Causation of Miner's Death.*** Since this survivor's claim was filed after January 1, 1982, the issue of death due to pneumoconiosis is governed by 20 C.F.R. § 718.205(c). As amended, that subsection provides:

(c) For the purpose of adjudicating survivor's claims filed on or after January 1, 1982, death will be considered to be due to pneumoconiosis if any of the following criteria is met:

(1) Where competent medical evidence establishes that pneumoconiosis was the cause of the miner's death, or

(2) Where pneumoconiosis was a substantially contributing cause or factor leading to the miner's death or where the death was caused by complications of pneumoconiosis, or

(3) Where the presumption set forth at § 718.304 [relating to complicated pneumoconiosis] is applicable.

(4) However, survivors are not eligible for benefits where the miner's death was caused by a traumatic injury or the principal cause of death was a medical condition not related to pneumoconiosis, unless the evidence establishes that pneumoconiosis was a substantially contributing cause of death.

(5) Pneumoconiosis is a "substantially contributing cause" of a miner's death if it hastens the miner's death.

20 C.F.R. § 718.205(c) (2001). Subsection (5) was added when the regulations were amended. Under existing precedent in the Tenth Circuit (and elsewhere), consistent with new subsection (5), any condition which hastens a miner's death is a substantially contributing cause of death.

***Northern Coal Company v. Director, OWCP [Pickup]***, 100 F.3d 871, 20 B.L.R. 2334 (10th Cir.

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<sup>19</sup> Under 20 C.F.R. § 718.203, as noted in footnote 15 above, if a miner who worked for ten or more years in coal mines suffers from pneumoconiosis, there is a rebuttable presumption that the pneumoconiosis arose out of the coal mine employment. Here, the Miner worked 27 years in the coal mines so the presumption should come into play and cannot be rebutted by evidence showing that he also had some other lung conditions.

1996). *See also Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 757-62 (4th Cir. 1999); *Brown v. Rock Creek Mining Company, Inc.*, 996 F.2d 812, 816 (6th Cir. 1993); *Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093, 1099 (4th Cir. 1993); *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 1006 (3rd Cir. 1989). Thus, the standards are the same under the new and old regulations.

As the discussion above shows, I have found that the Miner suffered from at least minimal simple coal worker's pneumoconiosis. However, the bulk of the medical opinion evidence stands for the proposition that the Miner's end stage pulmonary disease, with its manifestations of honeycombing and primarily irregular opacities in the lung bases and mid lung zones, without coalescence of opacities indicative of complicated pneumoconiosis, suggests idiopathic pulmonary fibrosis rather than coal worker's pneumoconiosis. A board certified radiologist, Dr. Wiot, and three board certified pulmonologists, Drs. Repsher, Castle, and Rosenberg, while disputing the existence of CWP, hold this view, and Dr. Repsher has also stated that if the Miner had CWP, it was unlikely to have contributed to his overall pulmonary impairment. To the contrary, Dr. James has attributed all of the pulmonary fibrosis to coal dust exposure, as have Drs. Wright, Lincoln, and Nichols. However, for the reasons stated above on the issue of whether the Miner had coal miner's pneumoconiosis, I find it to be likely that the Miner had simple coal worker's pneumoconiosis but that his respiratory disability was primarily due to idiopathic pulmonary fibrosis.

Opinions as to the cause of the Miner's death were rendered by Drs. Nichols, James, Repsher, Castle, and Rosenberg. Drs. Castle and Rosenberg opined that the Miner's death was neither quickened nor hastened in any way by his underlying lung disease and Dr. Repsher, while not addressing the underlying lung disease, opined that his death was not hastened by CWP. Both Drs. Nichols and James opined that the Miner's lung condition, and specifically his CWP, hastened his death by reducing his ability to withstand the disease process and by preventing him from being a surgical candidate. However, the opinions of Drs. Nichols and James fail if the bulk of the Miner's respiratory disability is attributable to factors other than coal mine dust exposure, as I have found.

After considering all of these opinions, together with the other evidence of record, I find that the Claimant has failed to establish by a preponderance of the evidence that the Miner's death was caused in whole or in part by pneumoconiosis, either directly or as a contributory or hastening factor, under subsections (c)(1), (2), (4), and (5). Moreover, as the Miner did not have complicated pneumoconiosis, subsection (c)(3) is not satisfied. The claim must therefore be denied and it is unnecessary to consider any other issues.

**ORDER**

**IT IS HEREBY ORDERED** that the claim of Efemia Montoya, as surviving spouse of deceased miner Jose Montoya, for black lung benefits under the Act be, and hereby is, **DENIED**.

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PAMELA LAKES WOOD  
Administrative Law Judge

Washington, D.C.

**NOTICE OF APPEAL RIGHTS:** Pursuant to 20 C.F.R. § 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within thirty (30) days from the date of this Decision by filing a Notice of Appeal with the Benefits Review Board at P.O. Box 37601, Washington, D.C. 20013-7601. A copy of this Notice of Appeal must also be served on the Associate Solicitor for Black Lung Benefits, 200 Constitution Avenue, N.W., Room N-2117, Washington, D.C. 20210.